

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

JUL 23 2012

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2012-0199-PR
)	DEPARTMENT B
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
DANIEL MICHAEL MONTARULI,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF YAVAPAI COUNTY

Cause No. P1300CR20080006

Honorable William T. Kiger, Judge

REVIEW GRANTED; RELIEF DENIED

Sheila Sullivan Polk, Yavapai County Attorney
By Dana E. Owens

Prescott
Attorneys for Respondent

DeRienzo & Williams, P.L.L.C.
By Daniel J. DeRienzo

Prescott Valley
Attorneys for Petitioner

V Á S Q U E Z, Presiding Judge.

¶1 Pursuant to a plea agreement, petitioner Daniel Montaruli pled guilty to four counts of obtaining a narcotic drug by fraud and one count of possession of drug paraphernalia. The plea agreement provided Montaruli would participate in a drug

offender treatment program and if he successfully completed the program, the narcotics-related charges would be dismissed, and the drug paraphernalia charge would be designated a misdemeanor. After a sentencing hearing in October 2009, the trial court suspended the imposition of sentence and placed Montaruli on five years' probation on the narcotics-related charges. Montaruli sought post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., claiming trial counsel had been ineffective in allowing the case to proceed to sentencing without explaining that he had not violated the terms of his plea agreement and had lost contact with his appointed counsel and the director of the drug treatment program he had been ordered to participate in through no fault of his own. The court denied relief and dismissed the petition. This petition for review followed.

¶2 It is for the trial court to determine, in the exercise of its discretion, whether post-conviction relief is warranted, and unless a court has abused this discretion, we will not disturb its ruling on review. *State v. Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d 63, 67 (2006). The court did not abuse its discretion here.

¶3 The plea agreement specified various conditions of Montaruli's release, including his participation in a drug treatment program. He was to maintain contact with his attorney and the caseworker, keeping them informed of his whereabouts at all times, and to comply with all requirements of the treatment program. He also was prohibited from leaving the state without the permission of the caseworker or court order. The state has conceded Montaruli obtained permission from his caseworker, Kimiko Gach, to move to Las Vegas and participate in a drug treatment program there. In January 2009, the state requested that the case be set for sentencing, claiming Montaruli had entered the

plea a year earlier and the state had not received notice that he had completed the program. The court set the matter for sentencing on March 2, 2009, and ordered Montaruli to report to the Adult Probation Department by February 3, 2009. On February 4, after Montaruli failed to contact the probation department, the state requested that the court revoke Montaruli's conditions of release and issue a warrant for his arrest, and the court granted that request.

¶4 In August 2009, retained counsel filed a motion seeking to be substituted as counsel for the Yavapai County Public Defender, who had been representing Montaruli. The trial court granted the motion. Apparently, Montaruli had moved to Oregon in July 2008 and did not receive the order requiring him to contact the probation department. At the sentencing hearing on October 12, 2009, Montaruli's attorney explained Montaruli had permission from Gach to participate in Las Vegas's program, which he had begun in March 2008. Counsel explained that Gach had called Montaruli and said she would no longer be supervising the program and he would have to contact his lawyer and decide what to do. According to counsel, at that time, Montaruli left the Las Vegas program.

¶5 Counsel further explained that Montaruli's appointed counsel at the time, James Grandjean, had passed away. Montaruli apparently never heard back after he attempted to telephone Grandjean. Counsel commented that Montaruli had "made the mistake of just letting it go," surmising that if no one was returning his calls there was nothing he needed to do at that point. Counsel conceded Montaruli had "lost the opportunity to have no felonies out of this," and proposed this was punishment enough,

urging the court to place him on probation and not to order him to serve any period of incarceration, noting he had already served two months in jail.

¶6 Addressing the trial court directly, Montaruli explained he had tried to call Gach, but “her number was even changed,” and he did not hear back from Grandjean, learning later he had passed away. He added, “I know in hindsight I could have sent in this letter or did something to that [e]ffect but I really didn’t know what to do.” Montaruli told the court he had not intended to lose contact, but he did not know what to do and assumed someone would try to reach him. He claimed he was “flabbergasted” to be in the position of having felonies on his record, adding “I shouldn’t have done it to begin with . . . but, you know, I was having personal problems,” and stating he had meant no disrespect to the court by not appearing initially. The court suspended the imposition of sentence and placed Montaruli on probation as specified above.

¶7 Montaruli filed a pro se notice of post-conviction relief and a petition in December 2009. After retaining counsel, he filed a second or supplemental petition. Requesting an evidentiary hearing, Montaruli contended the state erroneously believed he had violated the plea agreement and the conditions of his participation in the drug treatment program. He asserted he had obtained permission to leave for Las Vegas. He claimed he had no idea why he was facing sentencing because “there was no allegation that he failed to complete the program” and “no record as to which theory the state alleged breach of contract.” Claiming defense counsel had been ineffective at sentencing, and his performance was both deficient and prejudicial, *see Strickland v. Washington*, 466 U.S. 668, 687 (1984), Montaruli asserted there had been no discussion at sentencing

“as to why he was being sentenced.” He asserted counsel “may have assumed that he was being sentenced based upon his failure to complete the program, however, prior to being sentenced his attorney should have requested a hearing to ascertain if he was, in fact, in breach of contract.” He alleged his “attorney’s efforts at sentencing were too little too late.” He compared what took place to a probation-violation proceeding and relied on *Bearden v. Georgia*, 461 U.S. 660, 668-69 (1983), for the proposition that he could not be faulted for failures that occurred “through no fault of his own.”

¶8 The trial court dismissed the petition in December 2010, finding Montaruli had failed to present a material issue of fact or law that would entitle him to relief. In his petition for review, Montaruli again contends he did not breach the plea agreement and that it was not his fault he had failed to complete the drug treatment program because his caseworker informed him the services no longer would be provided and his calls to counsel went unanswered. He essentially reasserts the arguments he raised in the Rule 32 petition. In the description of the issues to be raised, he contends one is ineffective assistance of counsel and the other is newly discovered material facts entitling him to relief pursuant to Rule 32.1(e). But Montaruli not only fails to develop the latter claim in the petition for review, he never raised a claim of newly discovered evidence in his Rule 32 petition, therefore, we need not address it. *See* Ariz. R. Crim. P. 32.9(c)(1)(iv) (petition for review shall contain “reasons why the petition should be granted”).

¶9 With respect to the claim of ineffective assistance of counsel, he has not sustained his burden of establishing the trial court abused its discretion by rejecting it. Montaruli clearly violated the terms of his plea agreement and the court found he had

failed to provide sufficient justification for his conduct, either at sentencing or again when it considered his petition for post-conviction relief. That determination was for the court to make in the exercise of its discretion. The record is clear as to why Montaruli was being asked to appear for sentencing. He had essentially disappeared without providing proof that he had completed a drug treatment program. Contrary to Montaruli's assertion, the case was not set for sentencing because the state was already asserting he had violated, or "breached" as he refers to it, the terms of the plea agreement. Rather, as the state explained in its response to Montaruli's petition for post-conviction relief, it requested that the case be set for sentencing because a little over a year had passed since Montaruli had entered the plea and it had no information whether Montaruli had successfully completed the out-of-state drug treatment program or had been non-compliant.

¶10 Montaruli has not established how counsel's failure to request a hearing before sentencing was deficient and prejudicial. He apparently moved to Oregon without permission and without informing the public defender's office, the trial court, or his probation officer. He does not dispute the state's contention that before sentencing, retained counsel provided the state with records from the Las Vegas treatment program, which established he had been discharged as non-compliant on June 17, 2008. He does not dispute he left the program, telling them he was moving to Florida to be close to his children and then relocated to Oregon. He told the probation officer who prepared the presentence report that he understood it was his responsibility to follow through with the treatment, but he did not do so and had left the program against the advice of a counselor.

Under the circumstances, it is unclear what counsel should have done or could have done to change the outcome here. And even assuming that counsel should have requested a hearing before sentencing, Montaruli has not established what counsel could have presented to the court at such a hearing that would have excused his violation of the terms of probation and the plea agreement.

¶11 In denying post-conviction relief, the trial court readily could have rejected Montaruli's excuses for failing to notify the court, counsel, or the caseworker of his whereabouts. And Montaruli cannot fault counsel for Montaruli's failure to complete even the Las Vegas program, which he had permission to attend. Thus, based on the record before us, we have no basis for concluding the trial court abused its discretion when it denied Montaruli's petition for post-conviction relief.

¶12 Although we grant the petition for review, relief is denied.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge